

CHARLES L. THOMAS J42134  
C.S.P. SOLANO P.O.BOX 4000  
VACAVILLE, CA. 95696-4000

 **ORIGINAL**

**FILED**  
08 MAY 16 PM 12:38  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CHARLES LEON THOMAS)  
Petitioner)  
V. )  
D.K.SISTO, WARDEN )  
RESPONDENT)

No.C07-359JF(PR)  
NOTICE OF MOTION  
AND MOTION TO AD-  
MEND FEDERAL PET-  
ITION

Petitioner proceeding pro se is a California State prisoner serving a determinate sentence of 111 years to life. On or about June 12, 2007, Petitioner filed a petition for Writ Of Habeas Corpus in this court raising several claims for relief. Petitioner mistakenly submitted to this court an incomplete draft of his intended petition. With the court's permission petitioner respectfully ask this court's permission to admend his Federal Petition for relief.

1                   1.    THE TRIAL COURT ERRED PREJUDICALLY IN ITS  
2                               RULINGS ON THE ADMISIBILITY OF DNA EVIDENCE.  
3

4 A. Appellant's trial counsel filed a motion to exclude DNA evid-  
5 ence and expert testimony on the grounds that(1) The DNA testing  
6 procedure was not generally accepted in the scientific community  
7 for testing mixed DNA samples, (2) The laboratory that conducted  
8 the testing did not follow generally accepted procedures; (3) The  
9 statistical techniques applied to the match between the perpetra-  
10 tors genetic profile and appellant's DNA failed to follow genera-  
11 lly accepted scientific procedures; and (4) The mathematical for-  
12 mula used to evaluate the evidence was not generally accepted in  
13 the scientific community.  
14

15                   2.    THE TRIAL COURT'S RULINGS ON THE ADMISSIBILITY  
16                               OF EVIDENCE VIOLATED APPELLANTS FEDERAL CONSTIT-  
17                               UTIONAL RIGHT TO DUE PROCESS; IN THE ALTERNATIVE  
18                               THE ERRORS RESULTED IN A MISCARRIAGE OF JUSTICE  
19                               UNDER STATE LAW REQUIRING REVERSAL.  
20

21 2.a. Evidence of appellant's prior rape was inadmissible char-  
22 acter evidence under Evidence Code §1101, In the alternative  
23 the evidence should have been excluded pursuant to Evidence Code  
24 § 352.

25               1. The uncharged crime was remote.

26               2. The uncharged crime was not sufficiently similar to the  
27 charged crime to support an inference of identity.

28               3. The evidence was unduly prejudicial in light of the age  
and trama of the prior rape victim.

1  
2 2.B. The trial court abused it's discretion by allowing the  
3 use of appellant's juvenile adjudication for impeachment.

4 C. Evidence that the victim of the prior rape suffered post  
5 traumatic stress was inadmissible.

6 D. Appellant's statements to a juvenile probation officer  
7 after admitting the 1987 rape were inadmissible.

8 E. Evidence that a semen sample was taken from the victim  
9 of the prior rape was inadmissible in the absence of any evidence  
10 that appellant had knowledge of the sample.

11 F. Evidence of appellant's later possession of a toy gun  
12 that was not identified as the weapon used in the charged crime,  
13 and false hair that was not connected with the charged crime,  
14 was inadmissible.

15 G. The trial court erred by refusing to limit evidence of  
16 appellant's parole status.

17 H. The trial court erred by excluding evidence of an ex-  
18 punged felony conviction for a crime of moral turpitude to im-  
19 peach the complaining witness in the charged crimes.

20 I. The combined effect of the trial courts' rulings on the  
21 admissibility of evidence violated appellant's Federal Constitut-  
22 ional right to Due Process; In the alternative, the error resul-  
23 ted in a miscarriage of justice under state law, requiring rever-  
24 sal.

1 3. THE ADMISSION OF EVIDENCE OF APPELLANT'S PRIOR  
2 JUVENILE RAPE PURSUANT TO EVIDENCE CODE SEC, 1108  
3 VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS TO  
4 DUE PROCESS AND EQUAL PROTECTION.

5  
6 A. Trial counsel's failure to object to the admission of evidence  
7 pursuant to Evidence Code 1108 does not operate to waive the  
8 issue on appeal, where any objection would have been futile in  
9 view of prevailing state law.

10 B. Evidence Code 1108 violated due process.

11 C. Evidence Code 1108 violates equal protection.

12 D. Prejudice.

13  
14 4. APPELLATE COUNSEL'S PERFORMANCE FELL OUTSIDE THE RANGE  
15 OF REASONABLE PROFESSIONAL ASSISTANCE AND AS SUCH APP-  
16 ELLANT WAS DENIED HIS 6th ADMENDMENT RIGHT TO EFFECT-  
17 IVE ASSISTANCE OF COUNSEL.

18  
19 A. Appellate counsel erred in his reading of the trial record  
20 and mis-represented the facts to the court. As a result appell-  
21 ant was denied effective assistance of counsel.

22 SUPPORTING FACTS.

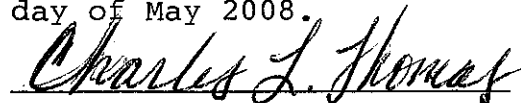
23  
24 Appellate counsel formulated a lengthy argument in his open-  
25 ing brief to the court based in part on his erroneous reading of  
26 the trial record. Counsel's argument was that the record showed  
27 no use of the AB1-310 Genetic Analyzer and as such Smith.People-  
28 v. Smith Supra 107 Cal.App. 4th should not serve as precedent,

1 As there was a material scientific distinction between app-  
2 ellant's case and Smith. The trial record clearly demonstrated  
3 use of the AB1-310 test as evident by testimony of both the pro-  
4 secutions and defense witnesses. R.T.31, R.T.314-318, R.T.351.  
5 Counsel's challenge to the admissibility of DNA evidence was  
6 based on a faulty premise and as such the argument had no merit.  
7 It's reasonably probable that a result more favorable to  
8 appellant would have been reached had appellate counsel's per-  
9 formance not been deficient.

10 B. Appellate counsel's decision to not exhaust in the state  
11 court the issue of reliability and admissibility of DNA evidence  
12 violated appellant's Federal Constitutional right to Due Process  
13 and Effective Assistance of Counsel. DNA evidence was the only  
14 thing tying appellant to this crime. It continues to be the app-  
15 ellant's position that the DNA evidence is unreliable, in part  
16 because 7 of the 13 loci in the evidence sample had fewer than  
17 four alleles observed. By not exhausting this issue in the state  
18 court appellant is barred from raising it in the Federal Court.

19 C. There were repeated and deliberate instances of gross  
20 misconduct on the behalf of the prosecutor that tilted the scale  
21 in an extremely close case in which the verdict could have went  
22 either way. Appellant's counsel's failure to raise the issue of  
23 prosecutor misconduct violated appellant's right to Due Process  
24 and effective assistance of counsel.

25  
26 Respectfully Submitted this 12th  
27 day of May 2008.

28 

C.C.P. §§446; 2015.5;  
28 U.S.C. §1746)

Charles Leon Thomas

, declare under the penalty of perjury that:

I am the Petitioner in the attached matter; I have read the foregoing document(s) and now the contents thereof; and the same is true of my own personal knowledge, or upon information and belief therein that they are true; that if called to testify as to the contents hereof I could do so competently as a sworn witness.

Executed this 14<sup>th</sup> day of May, 2008, at California State Prison / Solano, Vacaville, California.

(Signature)

*Charles Thomas*

Declarant

\*\*\*\*\*

DECLARATION OF SERVICE BY MAIL

(C.C.P. §§1013(a); 2015.5; 28 U.S.C. §1746)

I, Charles Leon Thomas, declare: That I am a resident of California State Prison / Solano State of California; I am over the age of 18 years; I am/am not a party to the above entitled action; My address is P.O. Box 4000 \_\_\_\_\_, Vacaville, CA 95696. I served the attached document(s) entitled:

NOTICE OF MOTION AND MOTION TO ADMEND FEDERAL PETITION

on the persons/parties specified below by placing a true and duplicated copy of said documents into a sealed envelope with appropriate First Class Postage affixed thereto and prepaid, and placing said envelope(s) into the United States Mail in a deposit box provided at the California State Prison / Solano, in Vacaville, California, addressed as follows:

OFFICE OF THE CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
450 GOLDEN GATE AVENUE  
SAN FRANCISCO, CALIFORNIA 94102

There is First Class mail delivery service by United States Mail at the places so addressed and/or regular communication by mail between the place of mailing and the addresses above. I declare under the penalty of perjury that the foregoing is true and correct and that I executed this service on this 14<sup>th</sup> day of May, 2008 at California State Prison / Solano, in Vacaville, California.

(Signature)

*Charles Thomas*

Declarant

CHARLES LEO THOMAS, JR. 42134

C. S. P. SOLANO

P.O. BOX 4000

VACAVILLE, CA 95696-4000

CSP SOLANO  
STATE PRISON



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